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**Assessment of the Initial Period of Operations of the Montana Statewide
Public Defender System**

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CONTENTS

	<u>Page</u>
I. Introduction	1
A. Background of this Study	1
B. Study Methodology and Site Schedule	2
1. Problem Definition Phase: First Site Visit	2
2. Second Site Visit: October Training Conference and Billings Regional Office	3
3. Third Site Visit: January 2009 Visits to Butte, Helena, Great Falls and Missoula	3
4. Email/Telephone Survey and Communications	3
5. Compilation and Review of Relevant Background and Supporting Materials	4
C. Principal Issues to Be Addressed in this Report	4
II. Analysis of Existing Situation	7
A. Summary Observations	7
B. Legislation Creating the Present State Defender System	8
1. Situation Prior to the OPD Legislation	8
2. 2005 Legislation: Principal Provisions	9
C. Staffing	12
Chart : OPD Staff by Office and Number of Cases Opened: July 1, 2007 – June 30, 2008	12
III. Observations and Findings	16
A. Management of the OPD System	16
1. Summary Observations	16
2. Major Management Deficiencies Noted	17
a. Lack of Meaningful Job Descriptions	17
b. Lack of Detailed Description of Organizational Structure	17
c. Lack of Annual Staff Evaluation	18
d. Lack of Operational and Management Data	18
3. Need for Information to Manage and Monitor OPD Operations	19
4. Supervision and Supervisory Structure	20
5. Special Issues Relating to Supervision/Evaluation of Contract Lawyers and Fee Payments	21
B. Management Information Necessary to Achieve Agency Objectives	23
1. Type of Data Needed to Manage the OPD System	23
2. Essential Management Data Needed for Defender Systems	24
3. Special Issues Relating to Information Needed for the Montana OPD System	25
4. Current Limitations of Available Caseload and Workload Information for the Montana OPD	26

	<u>Page</u>
C. Management Functions Which Need to be Undertaken	27
1. Staff Evaluations	27
2. Assuring Case Files are Maintained and Complete	31
3. Providing Attorney Supervision	31
D. Training	32
1. Statewide Training Services	32
2. Local Training/Mentoring	33
3. Training for Newly Hired Lawyers	33
4. Continuing Legal Education	34
E. Dealing with Conflict of Interest Situations	34
F. The Role of the Commission	37
G. Caseload and Workload Data	39
1. Assessing the “Weight” of a Case: Attorney Caseload Standards	39
2. Examination of Selected District Court Case Files Regarding Method of Disposition	41
H. Providing Adequate and Useful Information to the Commission and the Legislature	42
I. Role of the Chief Defender: Accomplishments and Challenges	44
IV. Case Study: Region 9: Billings (Yellowstone County)	49
V. Recommendations	54
A. Management and Administration	54
B. Conflict of Interest Cases	56
C. Training and Continuing Education	56
D. Evaluation of Lawyers	57
1. General	57
2. Special Issues Relating to Contract Lawyer Supervision and Evaluation	58
E. Implementing Early Case Entry	59
F. Planning for Case Overloads, Budgeting and Other Resource Needs	60
1. Caseload Control and Overload	60
2. Budgeting	60
G. Improving Communication Between the Chief Defender and Staff	61
H. Reaffirming The Commission’s Authority	62
I. Miscellaneous	64
VI. Conclusion	66

APPENDICES

- A. Memorandum to Public Defender Commission, Randi Hood, and OPD Attorneys and staff from Daniel Donovan. Self-Evaluation: ABA Ten Principles of a Public Defense System. April 15, 2008

- B.**
- (1) Letter from Daniel Donovan to Tara Veazey, Chair, Montana Public Defender Commission. February 9, 2009.**
 - (2) Motion for Counsel in Initial Appearance. Submitted by Daniel Donovan. Eighth Judicial District Court, Cascade County (March 16, 2009)**
 - (3) State of Montana Vs. David Pando. Order to Provide Assistance of Counsel to Indigent Defendants at Initial Appearance. Eighth Judicial District Court, Cascade County, March 19, 2009**

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V. RECOMMENDATIONS

The following is a summary of the study team's recommendations, many of which have already been presented in the body of the report. The recommendations presented are designed to address the information and management deficiencies that have been addressed in the foregoing sections of this report and assist the Commission in developing further its strategic planning efforts.

A. MANAGEMENT AND ADMINISTRATION

Recommendation 1: The OPD needs to provide detailed information to adequately describe the Agency's caseloads, dispositional processes, attorney workload, and related data that describes the Agency's operations and services being performed.

The 2005 Defender enabling legislation requires the Agency to provide detailed caseload and disposition information. Defender Commission Standards and policy requires the same information in more detail (Standard V-1, 2, Policy 115, 108). That information, in sufficient detail, has been promised by OPD staff. That promise has not been fulfilled. As a result no data driven substantive oversight is possible. Caseloads of staff attorneys and contract lawyers are at best minimally controlled; statistics on case disposition are not accumulated or reported. Time records of staff lawyers also are required (Policy 120). However, we did not see any such records. Certainly, no such records are referred to or utilized in any evaluation of lawyers, assignment of cases, or performing the supervision function. There was substantial evidence that at least some of the staff lawyers have too many cases, and many of the Commission standards are not followed and, perhaps, totally ignored.

Recommendation 2. The case weighting system should be refined to provide a meaningful reflection of the work entailed in handling different types of criminal cases

The Agency does not have a workable caseload control system. A case weighting study is needed to determine the time it takes for various case activities. While there was a case weighting system presented to the Commission, the various weights assigned to a variety of cases are the product of unsupported perceptions and, in some instances, patently inappropriate. For example, all felonies are given the same weight. Obviously not all felonies should be in the same weight category, i.e. a capital murder should not be weighted the same as a felony theft, etc. Nor should a case that goes to trial be necessarily considered with the same weight as a case that is disposed of by a plea of guilty.

Recommendation 3. A meaningful system should be developed for evaluating the work of the lawyers.

Little to no evaluation of the work of lawyers occurs, although promised. The Agency must develop and use an evaluation system that is practical and that starts with case disposition and the process of disposition.

Recommendation 4. At a minimum, budget submissions should be supported by documentation describing the Agency's accomplishments presented in concrete terms.

Budget submissions to the Governor, Supreme Court, Legislature and Commission are woefully inadequate. In the almost three years since the Defender Agency began to fully function, there has been little effort to document the Defender Agency's accomplishments. The Agency must track case progress and present concrete information on case disposition. That information should, at a minimum, be categorized by type of case and provide case result, caseload and case dispositions for each separate lawyer.

Recommendation 5: The "minimal" caseload statutory requirement for the Chief Defender, Contract Manager and Regional Deputy Defenders should be reduced or eliminated.

Managerial staffs, including the Chief Defender, the Contract Manager, and Regional Deputy Defenders have a significant caseload. As a result, supervisory staff are too busy representing clients. They are not managing. The problem is not only the lack of time to manage; simply stated, the problem may be a lack of desire to manage or a lack of knowledge as to how to manage. The Agency is adrift. In the next legislative session the Commission should submit a legislative proposal to eliminate the "minimal" caseload requirement for the Chief Defender, Contract Manager, and Regional Deputy Defenders. Until the "minimal" caseload statutory requirement is eliminated, the management staff should not undertake more than one case at a time, and not serious cases. As it now stands there is little to no time for management.

Recommendation 6. The Commission must become more aggressive in demanding comprehensive, reliable reports of Agency activity.

The Commission meets often and regularly, but has not been effective in obtaining reliable information of the Agency's work. It must insist upon implementation of an adequate data collection system in each of the regional offices. Implementation of a complete data collection system will require that each regional office and the contract management office have an information retrieval system in place. The system must allow managers to have immediate access to present caseload data by attorney (including information about the critical details of each case), caseload assigned by attorney, caseload disposed and disposition method by attorney. A staff person in each region must have responsibility for data integrity to insure that data is entered accurately and in a timely manner into the system. This recommendation is the foundation for most management functions in a unified statewide agency. It is the foundation for most of our recommendations. Without adequate information this Agency will not be able to function effectively and with efficiency.

B. CONFLICT OF INTEREST CASES

Recommendation 7. A separate Conflicts Office should be maintained for trial and appellate cases with the director reporting to the Commission, not the Chief Defender.

Rules of law and professional ethics forbid a lawyer and a law firm from representing clients where the lawyer or law firm would have a conflict of interest. Situations of conflict arise in trial level criminal cases, usually, but are not limited to cases where two or more persons are charged with the same offense. Conflicts also arise in appellate cases where the appellate lawyer is in the same firm or organization as the trial lawyer, and issues of ineffective trial lawyer should be alleged. Conflicting interests may also arise in family law and mental health cases. All conflicts should be quickly identified and resolved. There is a system in place to identify conflict problems. However, the present method for resolving the conflict problem is inadequate.

Although Commission Standards conclude that the Regional offices, the Appellate office, and the Contract Manager office are independent for conflict purposes, we strongly believe that conclusion is unsupportable. The Chief Defender has complete and ultimate authority over Agency staff and contract lawyers. The Chief Defender hires, fires, disciplines and is to evaluate all lawyers and other staff in the Agency. She has the authority to exercise supervision and control over every aspect in the Agency's representation of clients. Obviously the Chief Defender should delegate to other managers; lawyers assigned to a case have the prime responsibility for that case. Nevertheless, the ultimate responsibility for representation of clients and the quality of that representation lies with the Chief Defender. Hence, the Regions created by the Commission are not independent and cannot be considered anything more than divisions within the Agency for managerial purposes and convenience.

Accordingly, we recommend that a separate conflicts office, trial and appellate, be maintained with its director responsible to and reporting to the Commission, not the Chief Defender. The Chief Public Defender should be totally without interest in this conflicts division. In the unusual event of three or more persons who require separate appointment of counsel, additional lawyers will have to be appointed by the trial judge. Those additional lawyers of course must be without any employment connection to the Defender Agency, as staff or by contract, and must be compensated from funds that are not part of or do not come from Defender Agency appropriations.

C. TRAINING AND CONTINUING EDUCATION

Recommendation 8: The Training Director should regularly survey staff and contract lawyers to determine what training they believe is needed.

Recommendation 9: Each training program should have systematic feedback and evaluations from attendees.

Recommendation 10: At the very least the following activities should be a part of the training functions.

- a. *The training office should prepare and distribute a separate trial book applicable to each category of case, e.g. misdemeanor, felony, appellate, juvenile, etc.*

Trial books should be continually updated and be provided to contract lawyers as well as staff lawyers.

- b. *The Training Director should be responsible for developing and implementing through Public Defender managers two introductory programs:*

First: an orientation program for all new staff, including an introduction to office processes and policies.

Second: an initial skills program for the attorney staff to introduce the attorneys to their professional duties.

The practice standards approved by the Commission should be introduced as part of the skills program. Thereafter, the Trainer should be available to managers to assist in continuing training to improve skills of staff they supervise. To the extent possible these services should be made available to contract attorneys through the Contract Director.

- c. *The Training Director and the Appellate Division are developing a brief bank. That activity should continue and periodically be upgraded.*
- d. *Every continuing education training program should continue to be recorded and the recordings made available to lawyers.*

Trial and motion practice demonstrations should be videotaped and the videos made available to staff. Practice demonstrations by staff lawyers should also be made on video to enable lawyers to observe their own performance.

- e. *A monthly newsletter summarizing recent noteworthy decisions from higher courts and of any changes in Agency policy and procedures should also be prepared and distributed.*

It is anticipated that additional staff may be required for the Training Director to implement these recommendations.

D. EVALUATIONS OF LAWYERS

1. General

Recommendation 11: An evaluation procedure for lawyers needs to be developed which is timely, is based primarily on objective data, and promotes the lawyer's professional development over the next year.

The primary intent of evaluations should be to develop the best staff possible. Therefore, they need to be fair, dependable and timely. They should end with the employee and the manager having a clear plan for the lawyer's professional development over the next year.

Commission Standards (IV-E4, 5) and Policy (135) require yearly evaluations of staff and contract lawyers, including all supervisors. To date there have been no formal evaluations. The Chief Defender, together with another supervisor, is required to be involved in every yearly evaluation of every staff and contract lawyer. As discussed earlier in this report, a manual has recently been published by the Agency describing the prospective evaluation process which, if it were to be implemented, is both impractical and of little value in terms of assessing lawyers' performance. It includes courtroom observations of staff and contract lawyers, interviews with various persons who have observed the lawyer's work, and conferences with the lawyer who is being evaluated. There is a rating scale to be used by the evaluators. Oddly, the process totally fails to include any assessment of the case process and case results. The proposed evaluation is entirely subjective, anecdotal and impressionistic. Objective factors relating to disposition of cases that should be readily and easily attainable are totally ignored. In addition, the procedures proposed in the manual cannot possibly be implemented without the supervisory staff being greatly enlarged—an unlikely event.

Among many Agency employees there is also a perception of unfair favoritism and fear of unwarranted retaliation for perceived criticism of management. Those impressions may be exacerbated by any attempted use of the entirely subjective procedure outlined in the manual.

In place of these procedures, we urge the adoption of the evaluation procedures outlined in Section III C of this report. Of course, adopting those procedures would require implementing the case reporting system recommended

2. Special Issues Relating to Contract Lawyer Supervision and Evaluation

Recommendation 12. Special procedures should be developed for evaluating contract lawyers, relying primarily on the information provided in the proposed closing documents.

Clearly, the problems of supervising and evaluating contract lawyers are somewhat unique from those of staff lawyers. In the more heavily populated regions, the Deputy Defenders have, or should have, their hands full with supervising staff lawyers and handling their own cases. Even with substantial reduction of their caseload, staff obligations make it unlikely that the deputy defenders could participate heavily in the contract lawyer evaluations.

Of course, any observations managers make of a contract lawyer who is representing an assigned client in court should be reported to the Contract Manager, if noteworthy. Otherwise, evaluations of contract lawyers should be primarily the job of the Contract Director. Although Commission policy directs the Chief Defender to also be involved, her involvement should be limited to oversight and not in the active evaluation process.

The evaluation of contract lawyers should initially be based upon case dispositions and the process for case disposition. The fee petitions and proposed case closing documents should be the first line, the primary source for information relative to contract lawyer performance evaluations. Deputy defenders in regions with little or no attorney staff can be more actively involved in evaluating contract lawyers in their regions, especially in gathering information from third parties such as judges and prosecutors. If the suggested case closing documents are adopted and tabulated, most problems are likely to be identified from these documents and the fee petitions, without the need for actual observation of the lawyer in court, thereby reducing the evaluation burden to a more manageable activity as well as bringing a degree of objectivity into the evaluation process.

***Recommendation 13.** A contract lawyer should be prohibited from having an assigned client becoming a fee client in the originally assigned case.*

A contract lawyer should be specifically prohibited from taking any money or benefit from an appointed client or from anyone for the benefit of the appointed client.

E. IMPLEMENTING EARLY CASE ENTRY

***Recommendation 14.** An emergency lawyer should be available 24 hours, seven days a week to ensure immediate provision of counsel in compliance with the Commission Standards.*

Commission Standard III-2 imposes the obligation to provide counsel "...as soon as the person is under investigation, arrested..." and at the initial appearance. However, there is no evidence that the Agency has seriously attempted to implement this standard. Indeed, as already noted, in some counties lawyers are not representing people at the initial court appearance.

Accordingly, it is recommended that implementation of this standard requires that each Regional Office require a lawyer, staff or contract lawyer, on a rotation schedule, to be designated as an emergency lawyer available 24 hours, seven days a week to provide his/her services when called. An agency emergency number should also be established in each Region for this service. Each police department and arrestee holding facility should be notified of the availability of an emergency public defender attorney and the telephone number of the duty lawyer posted in a plainly visible place in the police facility or holding cell area. If police agencies do not cooperate, a court order requiring cooperation should be requested. The availability of that service should be effectively advertised.

F. PLANNING FOR CASE OVERLOADS, BUDGETING AND OTHER RESOURCE NEEDS

1. Caseload Control and Overload

Recommendation 15. Management staff should develop a plan for situations in which case overloads occur, particularly when they coexist with budget shortfalls

There is evidence that at least some lawyers have too many cases. As noted earlier, the present system does not quickly present an up-to-date picture of caseloads of staff and contract lawyers so that cases can be intelligently assigned. At present cases are assigned to staff by rotation without regard to case inventories unless a lawyer complains of case overload. In the present Agency environment, many lawyers are unlikely to complain about their work load. Hence, they may neglect some preparation or fail to timely represent clients. Accordingly, it is essential that managers themselves identify excessive caseloads of staff.

Also, there are no plans in place to confront a looming problem of too many cases and budget shortfalls. Management must be prepared to quickly submit a supplementary appropriation request. That request must document the emergency with concrete factual data.

Management staff should develop a plan to address the excessive case assignment problem when additional funding is not available. Any plan developed must assure that Commission Standards addressing quality of representation are not diluted and must be submitted to the Commission for its approval. (See formal opinion 06-441, ABA Standing Committee on Ethics and Professional Responsibility.)

Recommendation 16. When caseloads of staff lawyers are at maximum levels for assuring effective levels of service and contract lawyer resources are exhausted, the Defender Agency must refuse to accept more cases.

The ethics of the legal profession require that a lawyer should not accept more cases than the lawyer can effectively and timely attend to. Defender lawyers are bound to that ethical requirement as are private practice lawyers. Accordingly, when a lawyer reaches the maximum number of cases she/he can handle, the lawyer must reject additional appointments. Any court order of appointment when the Agency has reached its maximum caseload should be challenged, and the Agency should be prepared to meet that contingency. Of course, it is essential that the Agency have reliable, up-to-date case numbers for each of its lawyers to support its refusal to accept appointments. Otherwise, challenging a court order of appointment cannot be justified.

2. Budgeting

Recommendation 17. Budgeting for the 2012-2013 biennial legislative session should begin immediately.

Among the specific requests to the Legislature should be the following:

- a. An increase in the contract lawyer hourly rate to at least the federal court rate for appointed lawyers.
- b. Action to ensure that the salaries of defender staff attorneys are on a par with salaries of other state employed lawyers.

There is evidence that defender staff lawyer salaries are on average considerably lower than salaries of other state employed lawyers in Montana. Those salaries must be raised to be on par with salaries of other state employed lawyers. The Union that represents Defender Agency staff should be utilized to convince the Legislature to remedy this unwarranted discrimination. If this discrimination continues, experienced, quality defender lawyers will be lost to other government offices.

- c. The “minimum” case requirement for all managers, including the Chief Defender, should be stricken from the Defender legislation.

If managers want and have time to represent a defender client or two, they should be allowed to do so only if they are adequately performing their management duties.

It is foreseeable that there will be a need to increase Agency personnel at management, staff and support levels. Implementation of the recommendations in this technical assistance report may require additional staff. The Commission should not hesitate in making such requests. For such requests to be persuasive, however, they must be supported by concrete data.

Recommendation 18. There should be a separate fund category for emergency situations. Some examples where contingency reserve funds are essential are the high profile case, instances of extreme community disorder, and other catastrophic events.

G. IMPROVED COMMUNICATION BETWEEN THE CHIEF DEFENDER AND STAFF

Recommendation 19. The Chief Defender should communicate with staff regularly regarding the application of policies and procedures to OPD office operations, staff compensation, evaluation, etc., as well as any proposed changes in these policies.

Issues relating to existing policies and procedures as well as any changes or additions to these policies, standards, or other internal Agency procedures should immediately be disseminated to staff. As it stands now such communication is seriously inadequate.

Recommendation 20. The rationale for distribution of resources to Regions must be published, explained and supported by facts.

As noted earlier in this report, there is presently the appearance of unjustified and uneven distribution of resources among the Regions. Billings/Region 9 is a prime example of perceived disproportionate allocation of resources. It has a comparatively high caseload, yet receives considerably less resources than other regions with a smaller caseload. If this is somehow justifiable, the justification should be demonstrated and communicated. If not justified, the allocation of resources should be adjusted. The recent addition of two lawyer slots in Region 9 is helpful. Unfortunately, on the basis of known facts, Billings is still under funded and still without explanation to justify the disproportionate funding.

Recommendation 21. Special effort should be made to remove the fear of retaliation from management for publicly noting Agency problems.

A number of staff believes there is blatant, unfair favoritism displayed by top management. Some also fear inappropriate retaliation from top management if they were to file a grievance, complain of having too many cases, or alert managers to other problems. Of course, any basis for such an impression must be eliminated. Also, staff must be assured that unwarranted discriminatory or retaliatory practices do not occur.

H. REAFFIRMING THE COMMISSION'S AUTHORITY

Recommendation 22. The Commission must demand accountability from staff for implementing its promulgated standards and policies and for providing competent, efficient representation.

Pursuant to its mandate from the Montana Legislature (47-1-105 of the 2005 Montana Defender Act), the Commission has adopted standards and from time-to-time has issued administrative policies. However, there has not been any objective information illustrating implementation of those standards and policies. Indeed, there is evidence that some standards are not met, and that some policies have not been implemented. It is the obligation of the Commission to enforce its Standards and to cause its Policies to be implemented.

The Commission is without its own staff. Commissioners are not financially compensated; they have their own law practices or other occupations and meet only periodically. Hence, it is the duty of the Chief Defender with her staff to provide the information necessary for the Commission to function. The Commission must insist upon receiving adequate information. Having accurate, adequate, current, and objective information from staff should be the Commission's present and most pressing priority.

Recommendation 23. The Commission must become considerably more assertive in demanding relevant information from staff.

The function of the Defender Agency is to effectively and efficiently represent their clients. The Commission has established Standards to guide staff. It is the duty of staff to prove that standards and policies are followed. It is the obligation of staff to prove its

effectiveness and efficiency to the Commission, the Governor, and the Legislature. The staff has failed to do that.

Recommendation 24. The Commission should also raise challenging questions and provoke management into considering new options.

The obligation of the Commission is to question! The managers must respond! For example, how will staff respond to a sudden and unexpected riot or demonstrations where large numbers of people are arrested?

Recommendation 25. The Commission should consider selecting a secretary from its own ranks or hiring a person for that job and not rely upon the Chief Defender to act as secretary to the Commission.

The Commission should consider hiring a staff person to provide support for its operation. Presently, it appears to rely on the Chief Defender and the Administrative Director. Neither the Chief Defender nor any other OPD staff member should hold any position on the Commission.

Recommendation 26. The Commission should insist that definitive lines of authority be established, published and be included in job descriptions and be communicated to all staff.

While it is crystal clear that Randi Hood is the Chief Operating Officer of the Agency, other levels of authority have not been as clearly delineated. For example, who, or what position, is the second in command? Who is in charge when Ms. Hood is ill or on vacation or involved in a trial? Where does the Contract Manager stand in the line of authority in regard to the regional deputy defenders and contract lawyers within the regions? Where does the position of Training Director fall in the managerial hierarchy? Does he have authority to require staff lawyers to attend training sessions? Does he have authority to plan, schedule, and impose training requirements for the regions, or is that the prerogative of the regional deputies? Where does the Chief Administrative Officer stand in the line of authority? May he impose administrative procedures for the regions, or are those matters within the prerogative of the Deputy for the Region?

Recommendation 27. The Commission should consider imposing its own limitations upon the private practice of law by a defender staff member at all levels of authority within the Defender Agency.

A recent ethics opinion by the Montana Bar Association appears to find no prohibition against a Defender staff lawyer taking on private clients in civil cases as long as there is no interference with defender duties, and is done on the lawyer's own time. The Commission should develop more definitive guidelines for Defender staff attorneys regarding this issue.

Recommendation 28. The Commission should require a strategic plan from each region that, among other things, results in measurable improvement in supervision, management, retrieval of information, and evaluation of staff.

Recommendation 29. The Commission itself should evaluate and assess what statutory provisions have been adequately satisfied and where it has fallen short.

Montana's Defender Legislation spelled out a number of specific duties of the Commission. Commissioners should examine those provisions (47-1-104 (1) (2) (3), 47-1-105, Montana Defender Act, 2005) to determine what provisions have been complied with and which may not have been at this point. To make this assessment, the Commission must rely on information from Agency staff. The Commission must be insistent on a continuous flow of relevant information.

I. MISCELLANEOUS

Recommendation 30. Commission members and Agency management should be active in proclaiming the value of the Agency throughout the state and should speak to civic organizations, schools, and other community groups regarding the role which the Agency plays in the community.

Criminal defense is often not an undertaking most people see as valuable. The Public Defender is a new state agency using taxpayers' money to defend people charged with murder, rape, robbery and other mayhem. It is essential that the Agency demonstrates that it is an important part of law enforcement. It enforces the constitutions of the United States and the State of Montana. Hence, its value to the public must be brought to the attention of the public. Commissioners and staff should elicit invitations to speak at schools, civic organizations, private clubs, etc. to describe the need for the Agency and tell of its contributions to society in general and law enforcement in particular. After all, the Defender Agency protects the constitutional rights of all citizens when it enforces those rights for their clients.

Recommendation 31. Investigative resources should be provided for misdemeanors as well as felonies.

As noted earlier in this report, the study team was informed that, recently, lawyers have been instructed that they may not use investigators when preparing to defend clients charged in only misdemeanor cases. If that is true, that restriction should be rescinded immediately. A defense lawyer must have investigation done on all cases. Investigators are essential for a number of reasons. First: using investigators is more efficient than having the lawyer do all the investigation. Of course, a lawyer must also prepare for certain contingencies such as always examining the crime scene. Second: a lawyer cannot testify at trial. Hence, the second essential need is to have the investigator prepared to testify when necessary, such as, when impeaching a prosecution witness by a prior statement that is inconsistent with the witness' testimony. Conviction of a misdemeanor can be very serious. It may disqualify the person from certain occupations

later in life. It is often the first step in the ladder of progression to evermore serious crime. It is important to as vigorously represent clients in misdemeanor cases as in other cases.

Recommendation 32. All lawyers should have authority to use automated legal research engines when necessary.

We were informed that not all lawyers in the Defender program are authorized to use research tools, such as Lexis and/or Westlaw, at Agency expense. Such a restriction hampers the research ability of the excluded lawyers and is detrimental to morale.

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